

STATE OF VERMONT  
PUBLIC SERVICE BOARD

Tariff No. 8281

Green Mountain Power Corporation's 2012 Base       )  
Rate Filing   )

Order entered: 10/21/2011

**PROTECTIVE ORDER RE PREFILED EVIDENCE**

**I. INTRODUCTION**

In this Order, we grant in part, and deny in part, Green Mountain Power Corporation's ("GMP") September 23, 2011, Motion for Confidential Treatment of Tariff Filing Workpaper. This motion requested confidential treatment of certain information filed by GMP as part of its 2012 base rate filing (Tariff Filing No. 8281) and the Vermont Department of Public Service ("DPS") as part of its recommendation concerning the base rate request.

**II. PROCEDURAL HISTORY**

On August 3, 2011, GMP filed its 2012 base rate filing with the Public Service Board ("Board"). On August 9, 2011, the DPS filed its recommendation concerning the base rate request. The DPS's recommendation included its consultant's report (the "Larkin Report") which contained information that the DPS stated GMP wished to protect as confidential information.<sup>1</sup>

On August 10, 2011, GMP filed an averment supporting confidential treatment of the redacted information contained in four of the Larkin Report's exhibits.

On August 19, 2011, the Public Service Board ("Board") sent GMP an e-mail message noting that some of the information GMP was requesting be treated confidentially appeared to be publicly disclosed in GMP's original tariff filing.

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1. The DPS filed redacted versions of page 18 of the Larkin Report and four exhibits to that report.

On August 23, 2011, GMP filed a letter noting that it should have filed a redacted version of Workpaper 2.4.1j (the document in GMP's original filing that contained the information GMP is seeking to protect). Accompanying this letter was a redacted version of the workpaper, a revised averment supporting the protection of the information in Workpaper 2.4.1j, and an updated redacted version of exhibit LA-3 which disclosed additional information previously redacted.

On September 9, 2011, the Board sent GMP a memorandum requesting that GMP file an appropriate motion for confidential treatment along with a description of the process it uses to ensure that confidential information is not contained in tariff and other filings made with the Board, and whether GMP has made any changes in its process as a result of this tariff filing.

On September 23, 2011, GMP filed a Motion for Confidential Treatment of Tariff Filing Workpaper concerning Workpaper 2.4.1j and the four exhibits to the Larkin Report.<sup>2</sup> Specifically, GMP states that the redacted passages contain confidential information that is competitively sensitive and should be maintained as confidential. GMP submitted an averment to support its request for confidentiality. GMP also provided a description of the process it uses to ensure that confidential information is not contained in tariff and other filings made with the Board, and a description of the changes GMP has made to the process for preparing its tariff and rate filings as a result of this tariff filing.

On October 4, 2011, the DPS filed a letter stating that it has no objection to GMP's Motion for Confidential Treatment of the information identified in the motion. However, the DPS stated that it had asked GMP to explore the possibility of providing a specific date for termination of confidential treatment of the redacted information, rather than a qualitative description of the period during which the information should be treated as confidential.

On October 14, 2011, GMP filed, via e-mail message, an amended averment that included more precise descriptions of the length of time it asserts the information should be kept confidential.

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2. GMP appears to have inadvertently neglected to include page 18 of the Larkin Report in its motion for confidential treatment.

### III. DISCUSSION

The Board has reviewed the motion and supporting materials, and concludes that GMP has made a *prima facie* showing that confidential treatment is warranted for some of the information at issue. Therefore, as explained further below, we hereby grant in part, and deny in part, GMP's motion for a protective order.

To promote full public understanding of the basis for its decisions, this Board has actively taken steps to limit the amount of information subject to protective orders. We have encouraged parties to remove material from that protection to the extent possible. Since 2001, we have required petitioners seeking a protective order to submit a document-specific (or information-specific) averment of the basis for keeping confidential any document (or information) that they wish to be kept under seal. This arrangement appropriately places a heavy burden on the party seeking confidentiality to justify that decision. It also ensures that counsel for the party seeking confidentiality has actually reviewed and considered the relevant confidentiality factors, as they relate to the specific document or information at issue.<sup>3</sup> Generally, we only resolve disputes about information when there is a genuine disagreement about its confidential nature.<sup>4</sup> However, even when the motion is uncontested the Board will review the motion and supporting averment or averments to ensure that the moving party has presented a *prima facie* case for keeping the document or information under seal.

In determining whether to protect confidential information, we consider three issues:

- (1) Is the matter sought to be protected a trade secret or other confidential research, development, or commercial information which should be protected?
- (2) Would disclosure of such information cause a cognizable harm sufficient to warrant a protective order?
- (3) Has the party seeking protection shown "good cause" for invoking the board's protection?<sup>5</sup>

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3. *Investigation into General Order No. 45 Notice filed by Vermont Yankee Nuclear Power Corporation re: proposed sale of Vermont Yankee Nuclear Power Station to Entergy Nuclear Vermont Yankee, LLC*, Docket No. 6545, ("Entergy Docket"), Order of 11/9/01 at 5-6.

4. *Id.* at 6.

5. *See, e.g., Entergy Docket*, Order of 3/29/02 at 2.

GMP asserts that portions of its 2012 base rate adjustment tariff filing, specifically, certain data contained in Workpaper 2.4.1j, should be kept confidential. Additionally, the Larkin Report contains that same information in four exhibits. GMP contends that the redacted information for all five documents should be kept confidential for the following reasons:

- (1) Release of the redacted information contained in tariff filing Workpaper 2.4.1j and Larkin Report exhibit LA-1 related to the budgeted price estimate for the purchase of the connectivity easements associated with the Kingdom Community Wind Project would place GMP at a disadvantage in completing the negotiations to purchase these easements from landowners.<sup>6</sup>
- (2) Tariff filing Workpaper 2.4.1j and Larkin Report exhibit LA-2 contain information related to the Reed & Reed pricing estimate for construction of the Kingdom Community Wind Project. This information is provided by Reed & Reed and contains quotes, bids, production rates, internal costs and mark-ups on the proposed work. All of these items are considered competitively sensitive information by Reed & Reed because they are in direct competition with other general contractors who could use this information to their advantage in other bidding processes. It is also competitively sensitive to GMP, because GMP regularly seeks competitive bids for construction of power generating facility upgrades and repairs by third-party general contractors and sub-contractors, which is a component of Reed & Reed's estimate. The information, if publicly disclosed, would let future bidders know the pricing GMP accepted for a project putting GMP at a competitive disadvantage in negotiating future contracts.
- (3) Release of the information set forth in tariff filing Workpaper 2.4.1j and Larkin Report exhibit LA-3 pertaining to pricing for the turbine contract with VESTAS would violate GMP's non-disclosure obligations contained in a Non-Disclosure Agreement and now in the contract with VESTAS, the turbine manufacturer for the Kingdom Community Wind Project. This information is considered competitively sensitive by VESTAS, because it is in competition with other turbine suppliers. Public disclosure of this information would also harm GMP by making it more difficult to enter into similar sorts of arrangements in the future and possibly subject it to liability for claims by VESTAS for violating its non-disclosure obligations.
- (4) Tariff filing Workpaper 2.4.1j and Larkin Report exhibit LA-4 contain the price breakdown for the Bemis, LLC ("Bemis") transmission line construction cost estimate associated with the Kingdom Community Wind Project. This information provides Bemis's labor productivity rates and

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6. Similar information has also been redacted in Larkin Report Exhibit LA-3.

estimates for their internal costs, information that is considered to be competitively sensitive by Bemis, because it is in competition with other transmission contractors. It is also competitively sensitive to GMP, because it regularly seeks bids for transmission construction and the information would let bidders know the price GMP accepted for a transmission project. GMP believes that release of this information would impair GMP's ability to obtain competitive quotes and bids for future hardware and construction projects.<sup>7</sup>

We have reviewed the motion and supporting materials, and we have applied the existing standard. We conclude that GMP has made a *prima facie* showing that confidential treatment is warranted for the material identified in GMP's Motion, with two exceptions.

The first exception is certain information contained on page 2 of exhibit LA-4. Specifically, GMP has not shown that the information under the heading "Quantity" in each of the three tables on page 2 of this exhibit should be kept confidential. GMP's averment discusses the need to keep Bemis's labor productivity rates and estimates for its internal costs confidential. It does not support keeping the number of poles, ledge holes, etc., confidential; these quantities are specific to the Kingdom Community Wind Project and are unrelated to Bemis's internal costs. Therefore, we deny GMP's request to provide confidential treatment for the information under the heading "Quantity" in each of the three tables on page 2 of exhibit LA-4.

The second exception is the information contained in exhibit LA-3 and Workpaper 2.4.1j regarding pricing for the turbine contract with VESTAS. GMP asserts that release of this information would violate GMP's contract with VESTAS. We do not accept that the contracting parties can arrange merely through their own agreement to shield information from public view. Vermont law creates a strong presumption that public records, such as the Larkin Report and its exhibits, are to be available for public inspection (1 V.S.A. § 315).

GMP also asserts that release of the VESTAS pricing information would harm GMP by making it more difficult for it to enter into similar arrangements in the future. On its face, this appears similar to the arguments GMP made supporting confidential treatment for the Reed & Reed and Bemis pricing information. However, there is a significant difference — GMP

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7. Averment at 1.

regularly seeks competitive bids for construction of transmission and power generating facility upgrades and repairs, while GMP does not regularly seek competitive bids for utility-scale wind turbines. We are providing confidential treatment for the Reed & Reed and Bemis pricing information because of the potential to disadvantage GMP (and by extension, its ratepayers) in future competitive bids since potential bidders would know the prices GMP recently accepted for similar projects. This rationale does not apply to the VESTAS pricing information since GMP does not regularly seek competitive bids for utility-scale wind turbines. Thus, GMP has not provided sufficient information to support confidential treatment for the turbine pricing information, and we deny its request to provide confidential treatment for that information.<sup>8</sup>

Therefore, we grant GMP's motion for a protective order for all of the material identified in its motion, except for the information under the heading "Quantity" in each of the three tables on page 2 of exhibit LA-4, and the turbine pricing information contained in exhibit LA-3 and Workpaper 2.4.1j.<sup>9</sup>

Furthermore, we have consistently reminded parties who seek confidential treatment for materials that they have a continuing obligation to reexamine protected information and to release material that would not cause competitive harm, or that has otherwise been made public (even during the course of this proceeding), particularly testimony and exhibits. We expect GMP to do the same here.

Finally we note that GMP has requested that the information be kept under seal for the following time periods: (1) for information related to financial terms of the landowner

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8. The DPS submitted a redacted version of page 18 of the Larkin Report which includes turbine pricing information. GMP's motion did not request confidential treatment of this page; however, we note that the redacted information is similar to the information in exhibit LA-3 which we have determined should not be provided confidential treatment. Therefore, if GMP had requested confidential treatment of page 18 of the Larkin Report, we would have denied the request for the same reason.

9. GMP's motion requested confidential treatment of certain information contained in its August 3, 2011, tariff filing and also submitted by the DPS. This redacted material included price estimates for the purchase of the connectivity easements associated with the Kingdom Community Wind Project. GMP's motion and averment state that the easement price estimates were included in Workpaper 2.4.1j and exhibit LA-1. However, similar redacted information is also contained in exhibit LA-3. We read GMP's motion as including a request for confidential treatment of the redacted easement price estimates in exhibit LA-3, and determine that those estimates should be provided confidential treatment for the same reasons the similar information in Workpaper 2.4.1j and exhibit LA-1 should be protected.

agreements concerning the easements, the length of the agreements; (2) for Reed & Reed pricing information, seven years from the date of the wind project's commercial operation; (3) for VESTAS pricing information, three years from the date of the wind project's commercial operation; and (4) for Bemis pricing information, two years from the date of the wind project's commercial operation.

At this time, we do not explicitly rule that any specific information should remain confidential for the length of the easement agreements, as requested by GMP. Instead we will grant protection to information related to the financial terms of the landowner agreements concerning the easements until the date of the wind project's commercial operation. GMP has persuasively argued that release of this information could place it at a disadvantage in completing the negotiations to purchase these easements from landowners. However, by the time the project begins commercial operation, all easement negotiations will have concluded, and there should be no further reason to keep the financial terms confidential.

With respect to the applicable time periods for confidential treatment, we grant GMP's request related to Bemis pricing information. However, we do not at this time grant GMP's request that Reed & Reed pricing information be kept confidential for seven years from the date of the wind project's commercial operation. We recognize that GMP engaged in extensive discussion with its vendors regarding the minimal time the pricing information would be considered competitively sensitive and a trade secret by the vendors. Nevertheless, we are focused on the potential disadvantage to GMP and its ratepayers in future competitive bids if potential bidders knew the prices GMP recently accepted for similar projects. We are not persuaded that, to avoid this potential disadvantage, it is necessary to protect the Reed & Reed pricing information for seven years from the date the wind project commences commercial operation. Instead, we will grant protection to the Reed & Reed pricing information for three years from the date of commercial operation. Prior to the end of this period, GMP may seek an extension for some or all of the redacted Reed & Reed pricing information if it can demonstrate that continued protection is warranted for the specific information for which the extension is sought.

Parties and other persons retain the ability to challenge whether information encompassed by this ruling should be removed from the special protections we adopt in this Order.

#### **IV. ORDER**

Therefore, It Is HEREBY ORDERED that:

1. The Confidential Information provided by Green Mountain Power Corporation ("GMP") and the Vermont Department of Public Service ("DPS") as described in GMP's Motion, except for the information under the heading "Quantity" in each of the three tables on page 2 of exhibit LA-4 and the turbine pricing information contained in exhibit LA-3 and Workpaper 2.4.1j, shall be treated in this proceeding as follows:

- A. All testimony, affidavits, transcripts, exhibits, and other documents that are subject to this Order as confidential information, and any documents that discuss or reveal documents that constitute confidential material, shall be placed in a sealed record by filing such information in sealed envelopes or other appropriate sealed containers on which shall be endorsed the caption and docket number of the proceeding, the nature of the content (*e.g.*, exhibit, report, etc.), and a statement that it shall not be opened or released from the custody of the Clerk of the Board except by Order of the Board. Notwithstanding such a statement, the members of the Board, any employee or consultant specifically authorized by the Board to assist the Board in this proceeding, and any Hearing Officer appointed to this Docket may have access to such sealed confidential information, but shall not disclose such information to any person.
- B. At hearing or conference in this proceeding, no persons, other than those who have agreed to be bound by this Order, and those whom the Board has expressly authorized to have access to this confidential information, shall be permitted to give, hear or review testimony given or held with respect to this confidential information.
- C. Each Board stenographer or reporter in this proceeding shall acknowledge and be bound by this Order. Each such Board stenographer or reporter shall be instructed to and shall start a separate transcription for testimony or discussion on the record of confidential information. Such transcription shall be marked "Confidential" and



shall be sealed and filed with the Clerk of the Board, and copies of the same shall be made available only to those persons authorized to view such information. Such transcription shall, in all other respects, be treated as confidential information pursuant to this Order.

- D. The Board retains jurisdiction to make such amendment, modifications and additions to this Order as it may, from time to time, deem appropriate, including any such amendments, modifications or additions resulting from a motion made pursuant to the Protective Agreement. Any party or other person may apply to the Board for an amendment, modification or addition of this Order.

2. On or before November 4, 2011, GMP shall file revised public and redacted versions of exhibit LA-4 to the Larkin Report and Workpaper 2.4.1j consistent with the terms of this Order.

3. On or before November 4, 2011, the DPS shall file a revised public version of page 18 of the Larkin Report consistent with the terms of this Order.

4. The protections established in Paragraph 1, above, shall expire after the following time periods, unless extended by further order of the Board: (a) for information related to financial terms of the landowner agreements concerning the easements, the date on which the wind project commences commercial operation; (b) for Reed & Reed pricing information, three years from the date the wind project commences commercial operation; and (c) for Bemis pricing information, two years from the date the wind project commences commercial operation.

Dated at Montpelier, Vermont, this 21<sup>st</sup> day of October, 2011.

<u>s/ James Volz</u>	)	
	)	PUBLIC SERVICE
	)	
<u>s/ David C. Coen</u>	)	BOARD
	)	
	)	OF VERMONT
<u>s/ John D. Burke</u>	)	

OFFICE OF THE CLERK

FILED: October 21, 2011

ATTEST: s/ Judith C. Whitney  
Deputy Clerk of the Board

*NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: [psb.clerk@state.vt.us](mailto:psb.clerk@state.vt.us))*